No. 89-449

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED SERVICES AUTOMOBILE ASSOCIATION, *et al.*,
Petitioners,

v.

CONSTANCE FOSTER, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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In its petition for certiorari, USAA showed that the Third Circuit has adopted a Commerce Clause analysis that nullifies the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which applies to evenhanded, nondiscriminatory statutes. Following the approach of its own previous decision in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987), the Third Circuit in this case ignored this Court's mandate to examine the burden on interstate commerce and determine whether it clearly exceeds the statute's local benefits. The court of appeals failed to consider the overall impact of the state statute on interstate commerce, and

instead weighed in the balance only "the degree to which the state action incidentally discriminates against interstate commerce *relative to intrastate* commerce." Pet. App. 32a, quoting *Norfolk Southern*, 822 F.2d at 406 (emphasis added in Pet. App.).

Because the Third Circuit found that the "statute regulated indiscriminately" in making no distinction between in-state entities and all others (Pet. App. 30a), and thus imposed no burden on interstate "relative to intrastate" commerce, it concluded that there was no relevant burden on interstate commerce at all. It thus upheld Pennsylvania's insurance anti-affiliation statute, without even considering the statute's severe consequences in foreclosing all national insurance companies wishing to continue their business in Pennsylvania from affiliating with certain financial institutions wherever located, and in barring entities diversified into the banking and lending industries from competing in the Pennsylvania insurance market.

In opposing review by this Court, the Commissioner and the intervenors make two arguments. First, they contend that the decision below is simply a straightforward application of this Court's Commerce Clause cases and is not in conflict with decisions of other circuits. Second, they maintain that review by this Court would be inappropriate because the Third Circuit's decision is interlocutory. These contentions are without merit.

1. Neither of the briefs in opposition undertakes to defend the Third Circuit's "relative burden" analysis first articulated in *Norfolk Southern* and applied dispositively in this case. Rather, they pretend that no such analysis exists, and argue instead that nothing occurred here other than a routine application of the *Pike* balancing test. Foster Opp. 15; Intervenors' Opp. 10. They note prominently the court of appeals' reference to *Pike* (Pet. App. 29a-30a), but pay no attention to its clear statement that there is no burden to be considered

if the statute treats in-state and out-of-state entities in the same way. Pet. App. 30a.

By ignoring the substance of the court of appeals' analysis, respondents conclude that the opinion below presents no conflict with the decisions of this Court or of other courts of appeals. Foster Opp. 16 n.3; Intervenors' Opp. 13, 15-16. Both briefs note in particular that the court of appeals' decision is consistent with *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). *See* Foster Opp. 16 n.3; Intervenors' Opp. 13. Nothing they say, however, alters the fact that this Court in *MITE* struck down the Illinois anti-takeover statute at issue both on the ground of its extraterritorial effect (457 U.S. at 643), and under the *Pike* balance, on the basis that its asserted justifications were insufficient to outweigh the burdens imposed on commerce. *Id.* at 643-644. In discussing those burdens, the Court in *MITE* referred to the deprivation of the right of individual shareholders to sell their stock at a premium, and to the hindering of "[t]he reallocation of economic resources to their highest valued use," thus impeding efficiency and competition. 457 U.S. at 643. It is precisely these interests in efficiency and competition that are at stake in this case.[1]

Rather than acknowledge that the Third Circuit has rendered Commmerce Clause balancing impotent in the

[1] Other efforts to minimize the conflict posed by the Third Circuit approach are no more persuasive. Respondent Foster (Opp. 16 n.3) asserts—correctly—that all the cases cited by USAA are "routine applications of *Pike*," but goes on to note—incorrectly and unaccountably—that this case is also. Respondent intervenors (Opp. 13 n.8, 15-16) seek to explain the conflicting circuit court decisions as all just illustrative of "the constitutional difficulty created when a single state imposes its requirements on multistate transactions." Of course, those are not the terms in which those opinions are reasoned. And even if they were, it is hard to imagine how the Pennsylvania statute, with its impact on affiliations located anywhere, and its capacity to override the policy judgments of other states (Pet. 18 n.17), would not be objectionable for its similar impact.

only context where it is relevant—that of evenhanded, nondiscriminatory statutes—respondents seek refuge in a superficial reading of this Court's decision in *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978). Foster Opp. 11-14; Intervenors' Opp. 7-8. They rely on the fact that *Exxon* upheld Maryland's bar to pursuit of a particular in-state economic activity (gasoline retailing) by entities also involved in a different, out-of-state, economic activity (petroleum refining), where the statute was nondiscriminatory but had its practical effect against refiners located out of state. Based on this fact, they conclude that *Exxon* is "on all fours" with the present case. Foster Opp. 11.

When one moves beyond these surface similarities, however, it becomes apparent that the balance of burdens against benefits present in *Exxon*, which led the Court to uphold the statute, has almost nothing in common with that presented here. The Court in *Exxon* relied on the fact that the statute could produce no shifting in the source of petroleum from out-of-state to in-state refiners, because there were no in-state refiners. 437 U.S. at 123, 125, 127. Thus, rather than affecting the allocation of sales between interstate and intrastate producers, the statute simply shifted sales among various interstate refiners. There is no reason to believe that this is true here, where Pennsylvania does have in-state insurers whose market share may be enhanced by legislation forcing certain interstate companies to withdraw from the market.[2]

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[2] The Court in *Exxon* made clear that this distinction may be critical in establishing a Commerce Clause violation (437 U.S. at 126 n.16):

> If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in

Further, the interstate consequences in this case go far beyond those in *Exxon*. As suggested in the amicus brief filed in support of the petition by the Financial Services Council and various other organizations concerned about the effects of the Pennsylvania insurance statute, section 281 is fundamentally incompatible with the present trend toward consolidation and integration of financial services. Amicus Br. 5-8. National insurance companies with established businesses in Pennsylvania cannot consider diversification into banking and lending activities—anywhere—unless they are prepared to cease conducting insurance business in Pennsylvania. And entities engaged in banking or lending—no matter where—are foreclosed from competing in the Pennsylvania insurance market. These impediments to evolution in the financial services industry obviously far surpass the consequence in *Exxon* of barring refiners from retailing their own products. As the Court noted in *Exxon*, "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. at 127-128.

On the other side of the ledger, the policies weighing in favor of the state statute also differ substantially. The goal of the statute in *Exxon* was to protect against inequities in gasoline pricing and distribution resulting at the time of the 1973 petroleum shortage. As noted in our petition (at 21 n.22), the vertical affiliation of refiner and retailer is plainly relevant to a perceived problem of unequal retail supply and unfair competition. Notwithstanding respondents' efforts to defend the policies underlying section 281 (Foster Opp. 1-4; Intervenors' Opp. 9-10), one cannot escape the conclusion that the statute was crafted to provide economic cover against competition from diversified and predominantly interstate sellers of insurance. Such protectionist purposes do not enjoy much

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Maryland and, indeed, no demonstrable effect whatsover on the interstate flow of goods.

favor in the balance against the economic burdens they impose. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).[3]

2. The Commissioner (Foster Opp. 16-17) and the intervenors (Intervenors' Opp. 6-7) also urge this Court to deny review because the court of appeals' decision is interlocutory. They point out that the court of appeals did not definitively rule against USAA, but instead remanded the case to the district court for consideration of USAA's claim that as a matter of state law it is not subject to the prohibition of section 281 because its bank is located outside of Pennsylvania. Because of this posture, they maintain that review at this time would be premature and, perhaps, even unnecessary.[4]

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[3] Respondent intervenors argue that USAA is barred from asserting the statute's protectionist nature because of the district court's statement that "USAA does not argue that the Pennsylvania law discriminates against interstate commerce in favor of local business." Intervenors' Opp. 10, quoting Pet. App. 57a n.6. This reflects a confusion about the nature of the relevant burden on interstate commerce that respondents share with the court of appeals. Petitioners have agreed throughout this proceeding that section 281 does not, either on its face or as applied to individual entities, discriminate between in-state and out-of-state entities. But, under this Court's balancing approach, that does not assure passage of Commerce Clause scrutiny. Though the statute draws no distinctions between in-state and out-of-state entities, it may still, as applied to real entities in the competitive marketplace, fall so heavily on the activities of interstate commerce as to outweigh the local benefits of the statute.

[4] The Commissioner and the intervenors do not—and cannot—argue that the Court is legally precluded from granting review simply because the decision below is interlocutory. Under 28 U.S.C. 1254(1), the Court can grant certiorari to review "any"court of appeals case, either "before or after rendition of judgment or decree." This Court has frequently granted certiorari to review interlocutory decisions. *See, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 192-193 (1974); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964).

This argument is incorrect for several reasons. In the first place, the position taken by the Commissioner and the intervenors necessarily assumes that there is a reasonable likelihood that the district court, on remand, will find section 281 inapplicable to USAA. What they fail to point out, however, is that, despite its decision to remand the case (*see* Pet. App. 16a-17a n.11, 40a), the court of appeals itself addressed the state law issue. Specifically, the court of appeals stated:

> [W]e note our view that the intent of § [281] is not ambiguous. That section was designed clearly to proscribe affiliations between all state licensed insurance companies and *any* savings and loans institutions. Accordingly, no detailed factual proceedings are necessary to determine the statute's applicability to Pennsylvania licensed insurance companies that purchase savings and loan institutions. . . . Moreover, on the records of these cases, we can discern no construction of the state statute that would limit its application such that review of the federal constitutional claims would be unnecessary.

Pet. App. 16a (emphasis in original; footnote omitted). *See also* Pet. App. 29a (referring to "§ [281]'s proscription of affiliations between Pennsylvania insurance companies and financial institutions—whether or not located in Pennsylvania"). In light of the court of appeals' pronouncements regarding section 281, respondents are incorrect in arguing that review by this Court would be premature.

Furthermore, in urging the Court to deny review and permit the case to be remanded, the Commissioner and the intervenors totally ignore the serious economic consequences of such a ruling. So long as the Third Circuit decision stands, entities that are currently selling insurance in Pennsylvania are unlikely to commence diversification into financial services covered by the statute's literal language. By the same token, financial entities,

such as banks, that are not already selling insurance in Pennsylvania will likewise be unlikely to seek or be granted entry into that insurance market. Such businesses will instead await the remand and subsequent renewal of the petition to this Court, in order to determine whether the decision below—and the Pennsylvania statute —will be allowed to stand. In short, many decisions by major insurance and banking companies—with very significant consequences for the financial services market—will be distorted because of the cloud created by the court of appeals' decision.

It is no answer to suggest—as do the intervenors (Intervenors' Opp. 7)—that petitioners can ultimately seek review by this Court "[i]f and when the statute is actually applied to USAA." As the proceedings conducted thus far suggest, months or years will pass before petitioners will be in a position to seek review by this Court of a judgment that is final in all respects. This case has been pending for five years, and the Third Circuit decision has already cast its shadow over the financial services industry for six months. Given the importance of the Commerce Clause issue in determining the future course to be pursued by a large number of major insurance companies and banks (*see* Amicus Br. 6-7), further delay is not warranted.

Any further delay would have particularly serious consequences for USAA, which currently faces the threat of having its license revoked by the Commissioner. As the Third Circuit recognized in its original decision holding that abstention was inappropriate (Pet. App. 77a):

> It is uncontested that USAA has an excellent nationwide reputation as an insurer and is financially sound. The threat of a license revocation, a harsh sanction, may suggest in the marketplace fraudulent or illegal activity or financial instability. It could be

> difficult or perhaps impossible for USAA to explain to consumers and to the insurance industry that the license revocation proceedings in Pennsylvania do not represent such a sanction. The threat of revocation might alarm an unknown number of USAA's more than 40,000 Pennsylvania policyholders into cancelling their insurance.

In light of the decision below upholding the constitutionality of section 281, the Commissioner might well decide to institute license revocation proceedings against other companies as well, resulting in similar adverse consequences for such companies.

Finally, apart from its specific impact on the insurance and banking industries, the court of appeals' decision warrants review at the present time for yet another reason. Unless this Court grants review, the decision below will be the controlling law in the Third Circuit for resolving future Commerce Clause challenges to even-handed statutes. As we explained (Pet. 9-15), that decision is contrary to several decisions by this Court and by other courts of appeals. These conflicts will remain uncorrected if the Court denies review and permits the case to be remanded to the district court on the state law question. For this reason alone, review at this time is plainly warranted.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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